Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

MAHER W. SOLIMAN
Petitioner,

v.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITIONER IN PROPRIA PERSONA
April 28th, 2003

47 pp

QUESTIONS PRESENTED

1. Whether plaintiff who alleges injuries caused by defendants' conduct: who may have deliberately manipulated the level of nicotine to sustain addiction in smoking, have systematically concealed material information and waged an aggressive campaign of disinformation about the health consequences of tobacco use, is barred by one-year statute of limitations pursuant to the provisions of CCP §340(3), that barrs untimely claims caused by defective product.

2. Whether plaintiff, who alleges injuries caused by defendants' conduct as referenced in question one, claims should have been governed by the Unfair Competition Law §17200 et seq. and the False Advertising Law §17500 et seq. and therefore the timeline is governed by §17208 that provides to four-year limitations period from the date of his discovery to defendants' conduct.

3. Whether the lower court erred in failing to recognize that at least two named defendants (Council for Tobacco Research-U.S.A., Inc., and Tobacco Institute, Inc.) are only trade associations and that these defendants do not manufacture, produce, sell or market any product.

4. Whether the decision conflicts with the United States Supreme Court in the case of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and the California Supreme Court in the case of *Mangini v. R.J. Reynolds Tobacco Co.*

(1994) 7 Cal.4th 1057, 1066.

5. Whether the present case involves a fundamental constitutional issue that is protected by the Seventh Amendment of the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption.

RULE 29.4(C) CERTIFICATION

Petitioner certifies that 28 U.S.C. 2403(B) may apply and that this Petition has been served upon the Attorney General of California.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Maher W. Soliman, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of United States Court of Appeals for the Ninth Circuit (Pet. App. B) is published. The Judgment and Orders of the District Court for the Northern District of California dismissing the Complaint (Pet. App. F) are unpublished.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied rehearing (Pet. App. A) on January 3rd, 2003. This Court has jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the U.S. Constitution, made applicable to the states preserves the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1913); *Parsons v. Bedford*, 28 U.S. (3 Pet. 433, 446-48 (1830). The Amendment has for its primary purpose the preservation of "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935); *Walker v. New Mexico & So. Pac. R.R.* 165 U.S. 593, 596 (1897); *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497-99 (1931); *Dimick v. Schiedt*, 293 U.S. 474, 476 , 485-86 (1935). The relevant provisions of California Law are produced in Article 6 Section 13 of the California

Constitution.

The relevant statutory provisions of California Law are: the Immunity Statute (former Section 1714.45); the Repeal Statute (current form of Section 1714.45); Comment *i* to Section 402A of the Restatement (Second) of Torts; California unfair competition law §17200 et seq. (Pet. App. K); and the false advertising law §17500 et seq. (Pet. App. K).

I. STATEMENT OF THE CASE

Petitioner brought this suit against respondents based on their violations of California unfair trade practice and false advertising law. According to petitioner's complaint, defendants' actions that give rise to liability include the following:

-Defendants have known for many years that nicotine is addictive, but have publicly denied both the fact that nicotine is addictive and their knowledge of this fact, in order to conceal the addictive nature of cigarettes from the public, including Petitioner-Plaintiff;

-During the same time that Defendants have publicly denied the addictive nature of nicotine, Defendants have intentionally controlled the level of nicotine and other toxic substances they have sold, in order to preserve the dependence of smokers on cigarettes that Defendants sell. To this end, Defendants have utilized additives such as ammonia, as well as designs for which Defendants have sought patents, to make cigarettes, in effect, a "package" for the delivery of nicotine. Defendants have intentionally sought to increase the delivery of nicotine and almost double the nicotine transfer efficiency of cigarettes, maintain the proper amount of nicotine in tobacco smoke, and delivery a pharmacologically active dose of nicotine to the smoker;

-During the same period of time, despite this voluntary and public undertaking to protect the public's "health as a basic responsibility paramount to every other consideration,"

Defendants have also intentionally avoided researching or developing cigarettes that would not cause dependence or addiction in those who use them;

-In their efforts to conceal the health hazards of smoking and the addictive nature of nicotine, Defendants have testified falsely under oath before the United States Congress, provided false explanations to customers and governmental agencies about the health hazards of tobacco and the harmful qualities of nicotine; concealed their secret research and testing on the dangers of cigarettes smoking and concealed their deliberate manipulation of the nicotine levels of cigarettes.

On or about January 26th, 2000, petitioner was diagnosed with smoking-related illness (Pet. App. J, FAC at ¶25.) On or about March 28th, 2000, petitioner brought this action against the defendants alleging that his injuries are caused by defendants' deceit and fraudulent conduct, and not by their product. (See also Pet. App. G)

II. REASONS FOR GRANTING THE WRIT

A. Reprehensibility of Defendants' Conduct (Pet. App. J, L)

The record fully supports finding that defendants knew by the late 1950's and early 1960's, that the nicotine in cigarettes is highly addictive, that substances in cigarettes tar cause lung cancer, and that no substantial medical or scientific doubt existed on this crucial fact. Nevertheless, motivated primarily by a professed desire to generate wealth, Philip Morris, in concert with other major tobacco companies, consistently endeavored through calculated misrepresentations to create doubts in the minds of smokers, especially addicted smokers such as plaintiff herein, that cigarettes are neither addictive, nor disease producing. In the language of a key internal document revealing the plan, Philip Morris and other tobacco companies set out to "create doubt about the health charge

without actually denying it." Pet. App. J, FAC at ¶144. (See also Pet. App. L)

The evidence supports a finding that in 1954, Philip Morris promised in a public announcement, run in over 400 newspapers nationwide, to pursue objective research into the health risks of smoking and to release the results for the benefit of consumers (See the "Frank Statement to Cigarette Smokers", Pet. App. I and Pet. App. J, FAC at ¶123). But, to the contrary, Philip Morris and other tobacco companies privately constrained research to produce results casting doubt on the alleged risks of smoking and went to extraordinary lengths to hide its own scientific information showing the company was fully aware of the true health dangers. One revealing memo written to the Company's top research scientists disclosed a practice of "burying" adverse internal research results ("[if the study proves nicotine is addictive] we will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original which I have."). Pet. App. J, FAC at ¶144. (See also Pet. App. L)

The record adequately demonstrates that Philip Morris and other tobacco companies publicly and falsely represented that: no proof existed that smoking causes cancer, knowing the opposite was true; that authorities have reached no agreement on what causes lung cancer, knowing the opposite was true; and that smoking is not addictive, knowing the opposite was true. While Philip Morris and other tobacco companies claim to have been relying on certain technical definitions of the language it used, the tobacco industry intended its publicly and widely disseminated words to be understood in a nontechnical sense, communicating a false impression that nicotine in cigarettes is not in fact addictive and that cigarette tars do not in fact cause cancer. Addiction by the layman was understood as a habit of addiction which is not an injury in itself, however, addiction as concealed by the tobacco industry was a harmful drug addiction which is severe injury. Such addiction was not known by the average layman of the community prior to 1998. (See also Pet. App. H)

Information, widely disseminated by tobacco industry provides that tobacco industry's doubt-creating scheme fully succeeded in the case of plaintiff herein and other similarly situated addicted to nicotine in cigarettes. This concerted effort to create doubt with misinformation was initiated long before the federal government enacted labeling statutes and was carried out for decades thereafter through the late 1990's. (See also Pet. App. H)

Substantial evidence supports a finding that tobacco industry was aware people who do not begin smoking in their adolescence are unlikely to become heavily addicted, life-long smokers. Philip Morris and other tobacco manufacturers focused its marketing on children, including the adolescent such as plaintiff herein in the 1960's, placing advertising where children were most likely to see it and crafting ads appealing to youthful passions for feelings of independence, identity and acceptance.

Circumstances surrounding the repeal of California Civil Code §1714.45 (enacted in 1987 and repealed in 1998) suggests some, if not a majority, of California's legislators in 1998 were deeply disturbed by revelations flowing from ongoing investigations of Philip Morris.

The allegations of the complaint fit a consistent pattern of deception. On this basis, the complaint asserts causes of action brought as a result to defendants' fraudulent conduct under California Unfair Trade Practice and False Advertising Law. The former creates a private right of action to remedy "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by" California's false advertising law. Cal. Bus. & Prof. Code 17200, 17203. The latter makes a criminal misdemeanor, and creates a private right of action to remedy, any statement "which is untrue or misleading" and is made or disseminated "before the public in this state **** in any newspaper or other publication *** or in any other manner or means whatever." *Id.* §§17500, 17535.

The legislature has enacted statutes that directly award damages against tobacco companies in product liability actions. The history of the statute which was

enacted was known as the "immunity statute".

B. The Immunity Statute

Enacted as part of the Willie L. Brown, Jr. -- Bill Lockyer Civil Liability Reform Act of 1987, former Section 1714.45 (the Immunity Statute).

The following California decision interpreted the Immunity Statute.

1. American Tobacco Co. v. Superior Court

The state Court of Appeal's 1989 decision in *American Tobacco Co. v. Superior Court, supra,* 208 Cal.App.3d 480 (American Tobacco), which was authored by Presiding Justice J. Anthony Kline, was the first to construe the Immunity Statute. In that case, the court described the Immunity Statute as the result of a "'peace pact'" or "compromise between parties seeking and opposing comprehensive changes in California tort law who had been locked in a long political struggle that had reached a stalemate." (*American Tobacco, supra,* at pp. 486-487.) Those involved included major special interest groups such as insurers, physicians, manufacturers, and plaintiff's lawyers. (Id. at p. 486.) The Court of Appeal in *American Tobacco* characterized the Immunity Statute as so "poorly drafted" that "on its face[, it was] amenable to two diametrically opposed interpretations, each of which conflict[ed] in some way with the words" used by the Legislature. (*American Tobacco, supra,* at p. 485.) But legislative history, the court noted, indicated that the Immunity Statute's intent was to ensure that "'high-cholesterol foods, alcohol, and *cigarettes* that are *inherently unsafe and known to be unsafe by ordinary consumers,* [were] not to be subject to product liability lawsuits.'" (*American Tobacco, supra,* at p. 487, italics added.) In light of that legislative intent, the Court of Appeal in *American Tobacco* concluded that the statutory immunity was very broad, providing "nearly complete" immunity for manufacturers and sellers of tobacco and the other enumerated products. (*Ibid.*)

C. THE REPEAL STATUTE

Ten years after enactment of the Immunity Statute, the California Legislature enacted the Repeal Statute, which amended former Section 1714.45, rescind the statutory immunity for tobacco companies as of January 1, 1998, when enacted the Repeal Statute provided, and with one major change still provides:

"(a) . . . .

"(1) . . . .

"(2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in comment *i* to Section 402A of the Restatement (Second) of Torts.

"(b) *This section does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions,* but does exempt the sale or distribution of tobacco products by any other person, including, but not limited to, retailers or distributors.

"(c) . . . .

"(d) . . . .

"(e) . . . .

"(f) *It is the intention of the Legislature in enacting the amendments to subdivisions (a) and (b) of this section adopted at the 1997-98 Regular Session to declare that there exists no statutory bar to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others who have suffered or incurred injuries, damages, or costs arising from the promotion, marketing, sale or consumption of tobacco products.*

It is also the intention of the Legislature to clarify that such claims which were or are brought shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense.

"(g) . . . .

Through subdivisions (b) and (f), the Repeal Statute expressly rescinded the statutory immunity from product liability lawsuits for tobacco companies that the Legislature had allowed 10 years earlier. Although the Repeal Statute retained the Immunity Statute's reference to comment *i* Section 402A of the Restatement Second of Torts, negating liability to voluntary users of certain common but inherently unsafe consumer products, the Repeal Statute in subdivision (a) omitted tobacco products from specified "inherently unsafe" products.

1. *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985 (A California Supreme Court Unanimous Decision)

In *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal. 4th 985, the California Supreme Court explained "that suppliers of certain products which are 'inherently unsafe,' but which the public wishes to have available despite awareness of their dangers, should not be responsible in tort for resulting harm to those who voluntarily consumed the products despite such knowledge." (*Id.* at p. 1002.) The Supreme Court described the Immunity Statute as based on the principle that "if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user." (*Id.* at p. 999, italics omitted.) Thus, as applied to tobacco products, the Immunity Statute was intended to protect tobacco companies from liability for their conduct as manufacturers and sellers of products containing tobacco that is pure and unadulterated, when the claim seeks damages for personal injuries or death resulting from dangers or risks that are commonly known to be inherent to

tobacco products.

The Immunity Statute drew "its express inspiration from product liability principles addressed by Section 402A of the Restatement Second of Torts (Restatement), and particularly comment *i* thereto (Comment *i*)". *Richards, supra,* 14 Cal.4th at p. 999, citing former §1714.45, subd. (a)(2). The California Supreme Court observed: "Section 402A of the Restatement proposes generally that when a manufacturer or distributor sells a product 'in a defective condition unreasonably dangerous to the user or consumer' [citation]. and the product reaches that person, as expected and intended, without substantial change in its condition, the seller is 'subject to liability' for physical harm 'thereby caused to the ultimate user or consumer.'" (*Richards, supra,* at p. 999.)

The California Supreme Court went on to say in *Richards*: "However, comment i asserts an important qualification for the general rule.....Comment *i* makes clear that, under the Restatement formulation,'[t]he rule [of liability] applies only where the defective condition of the product makes it *unreasonably dangerous* to the user or consumer.' (Restatement, p. 352, italics added.) As comment *i* then explains, '[m]any products cannot possibly be made entirely safe for al consumption,' but if a product is *pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway,* does not expose the seller to liability for resulting harm to a voluntary user.

"Thus, comment *i* observes, '[o]rdinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture,' but this is not what the Restatement means by 'unreasonably dangerous.' 'Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics.....*Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful*.....Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks....' (Restatement, pp. 352-353, italics added.)" (*Richards, supra,* 14 Cal.4th at p. 999, some italics

added in first par.)

Richards added: "The clear premise of comment *i* is that no 'liability' arises under the circumstances therein described because *there is no sound basis for liability.* In other words, comment *i* posits, a manufacturer or seller *breaches no legal duty* to voluntary consumers by merely supplying, in an unadulterated form, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers." (*Richards, supra,* 14 Cal.4th at p. 1000.)

Thus as the California Supreme Court explained in *Richards,* the Immunity Statute applied with respect to *"pure and unadulterated"* tobacco products (that is, products whose contents consumers *"desire[] to buy and ingest"*), notwithstanding that the *"inherent or unavoidable danger[s]"* of those products were *"commonly known to the community."* (*Richards, supra,* 14 Cal.4th ap pp. 999-1000, italics added.) Accordingly, the statutory immunity does not shield a tobacco company from product liability for injuries or deaths to consumers of its products caused by something not inherent in the product itself - that is, if some adulteration of the product made it unreasonably dangerous.

Plaintiff alleged in his First Amended Complaint (Pet. App. J), that defendants manipulated the addictive properties of cigarettes via additives and controlled nicotine delivery to smoker through adding ammonia (Pet. App. J at ¶¶¶210, 211 and 212.) The essence of these allegations is that defendant tobacco companies adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking. Because, as the California Supreme Court explained, the statutory immunity does not shield a tobacco company from liability for injuries or deaths caused by something not inherent in the product itself, the Immunity Statute does not bar these claims.
Indeed, as late as 1998, the Chief Executive Officer of Philip Morris (Geoffrey C. Bible) denied under oath, the addictive nature of nicotine and the harmful effect of smoking. (Pet. App. H)

Therefore, when, on January 1, 1998, the California

Legislature's repeal of that immunity took effect, the Legislature restored the common law principles that had, until enactment of the Immunity Statute, governed tort liability against tobacco companies in California. Thus, the Immunity Statute provides no protection to tobacco companies for their conduct. The Immunity Statue does not bar plaintiff's claims that the defendants adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking. Nor does the Immunity Statute shield tobacco companies from liability for conduct.

The California Supreme Court in *Khan v. Shiley*, 217 Cal. App.3d 848, 855-58, 266 Cal, Rptr. 106 (1990), the court stated:

Product liability is the name currently given to the area of law involving the liability of those who supply goods or products for the use of others to purchasers, users and bystanders for losses of various kinds resulting from so-called defects on those products. (Prosser & Keeton, Torts (5th ed. 1984 & sect95, p. 677.) Possible theories of recovery include strict liability in tort, negligence (i.e., in creating or failing to discover a flaw, in failing to warn or failing adequately to warn, or in the sale of defectively designed product) and breach of warranty (**express and implied**). **Allegations of fraud, however, are in a class by themselves**.....Unlike the other theories, in which the safety and efficacy of the product is assailed, **the fraud claim impugns Defendants' conduct.**

The California Legislature expressed intent to repeal the tobacco industry's immunity from personal injury suits provided in Civil Code Section 1714.45 (the "1998 Amendment") because:

"**Evidence has now become available** showing **tobacco companies may have deliberately manipulated the level of nicotine, a powerfully addictive substance, in tobacco products so as to create and sustain addiction in smokers**.In addition, evidence shows the tobacco companies

have **systematically suppressed and concealed material information and waged an aggressive campaign of disinformation** about the health consequences of tobacco use."

Thus, **the very basis for the 1998 Amendment** by the Legislature is the recently available evidence concerning the cigarette industry's **past conduct.**

In enacting the (1998 Amendment) the California Legislature amended Civil Code Section 1714.45 and clearly expressed its intent that personal injury actions were to be allowed based on the cigarette industry's **past conduct.**

"(f) It is **the intention of the Legislature** in enacting the amendments to subdivisions (a) and (b) of this section adopted at the 1997-98 Regular Session to **declare** that there exists **no statutory bar** to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others who have suffered or incurred injuries, damages, or costs arising from the promotion, marketing, sale, or consumption of tobacco products. It is also **the intention of the Legislature** to clarify that such claims which **were or are** brought shall be determined on their merits, without the imposition of any claim of **statutory bar** or categorical defense. Civ. C. §1714.45(f).

This plain language allowing claims by California smokers who "**have suffered or incurred** injuries, damages, or costs" which "**were or are** brought shall be determined on the merits without the imposition of any claim of **statutory bar.**

D. California Laws Prohibiting Consumer Deception

1. The Unfair Competition Law (Pet. App. K)

California's unfair competition law (UCL) (§17200 et seq.) defines "unfair competition" to mean and include "any unlawful, unfair or fraudulent business act or practice and

unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (17500 et seq..)]." (§17200.) The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 110.)

The UCL's scope is broad. By defining unfair competition to include any "*unlawful*....business act or practice" (§17200, italics added), the UCL permits violations of other laws to be treated as unfair competition that is independently actionable. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Here, for instance, the allegations contained in plaintiff's first amended complaint described defendants' reprehensible conduct and based on such conduct defendants violated the UCL by committing actual fraud as defined in and prohibited by Civil Code section 1572 and deceit as defined in and prohibited by Civil Code section s 1709 and 1710. By defining unfair competition to include also any "*unfair or fraudulent* business act or practice" (§17200, italics added), the UCL sweeps within its scope acts and practices not specifically proscribed by any other law. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* at p. 180.) Plaintiff's first amended complaint also alleged a UCL violation of this type.

Not only public prosecutors, but also "any person acting for the interests of...the general public," may bring an action for relief under the UCL. (§17204.) Under this provision, a private plaintiff may bring a UCL action even when "the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565.) "This court has repeatedly recognized the importance of these private enforcement efforts." (*Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126.)

In a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are "generally limited to injunctive relief and restitution." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone*

Co., supra, 20 Cal.4th at p. 179; see §§17203, 17206; *ABC Internat, Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1268.) An order for restitution may require the defendant "to surrender all money obtained through an unfair business practice" including "all profits earned as a result of an unfair business practice." (*Krause v. Trinity Management Services, Inc., supra*, 23 Cal.4th at p. 127.)

2. The False Advertising Law (Pet. App. K)

California's false advertising law (§17500 et seq.) makes it "unlawful for any person,.....corporation....., or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services....or to induce the public to enter into any obligation relating thereto, to make or disseminate...before the public in this state, ...in any newspaper or other publication....or in any other manner or means whatever....any statement, concerning that real or personal property or those services...which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading...." (§17500.) Violation of this provision is a misdemeanor. (*Ibid.*) As with the UCL, an action for violation of the false advertising law may be brought either by a public prosecutor or by "any person acting for the interests of itself, its members or the general public," and the remedies available to a successful private plaintiff include restitution and injunctive relief. (§17535.)

3. Common Feature of the UCL and the False Advertising Law

The California Supreme Court has recognized that "[a]ny violation of the false advertising law....necessarily violates" the UCL. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210.) The California Supreme Court has also recognized that these laws prohibit "not only advertising which is false, but also advertising which[,] although true, is either actually

misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626.) Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, "it is necessary only to show that 'members of the public are likely to be deceived.'" (*Committee on Children's Television, Inc. v. General Foods Corp., supra*, 35 Cal.3d at p. 211; accord, *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.)

4. Petitioner's Claims are Governed by Business and Professions Code Section 17200 et seq. under the Unfair Competition Law and Section 17500 et seq. the False Advertising Law (Pet. App. K)

Business and Professions Code Sections 17200, 17203 and 17204 authorize an action for unfair competition against a person or business that engages in false or misleading advertising. Business and Professions Code Sections 17500-17582 govern false or misleading advertising.

Business and Professions Code Section 17500 makes it unlawful for any person, firm, corporation, or association, or any employee thereof, to make or disseminate or cause to be made or disseminated, either to the public in California or from California to the public in any state, any statement concerning any circumstance or matter of fact connected with the proposed performance or disposition of the property or services, if the statement is (1) untrue or misleading, (2) is known, or by the exercise of reasonable care should be known, to be untrue or misleading, and (3) is made or disseminated or caused to be made or disseminated with intent directly or indirectly to dispose of the property, to perform the services, or to induce the public to enter into any obligation relating thereto. The prohibition extends to statements in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or ina any other manner or means whatsoever. Bus. & Prof. Code 17500.

In *City and county of San Francisco v. Philip Morris, Inc.*

(N.D. Cal. 1997) 957 F. Supp. 1130. 1140, the Court, in deciding an action brought by various counties against cigarette manufacturers, held that "**California law recognizes a distinction between claims based on fraudulent conduct and claims based on defects in a product.**" (Emphasis added.) The Court approvingly cited *Khan v. Shiley*[1] which recognized the distinction between fraud actions and actions based on smoking and health. Based on this distinction, the Court found that plaintiffs' **state law fraud and special duty claims were not barred by the former version of Civil Code Section 1714.45.** *City and County of San Francisco, supra,* 957 F. Supp. at 1140. No California appellate court has ruled otherwise.

It is also unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claim, including claims that (1) purport to be based on factual, objective, or clinical evidence, (2) compare the product's effectiveness or safety to that of other brands or products, or (3) purport to be based on any fact. Bus. & Prof. Code §17508(a). A statement is untrue or misleading for purposes of Business and Professions Code Section 17500 if members of the public are **likely** to be deceived. Actual deception or confusion is not required. Therefore, a violation of the statute is actionable without individualized proof of deception, reliance, and injury. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197.

The prohibition in Business and Professions Code Section 17500 against false or misleading advertising extends to negligent, as well as to intentional, dissemination of such advertising. *People v. Forest E. Olson, Inc.* (1982) 137

[1] The Court of Appeal recognized this distinction between a product-liability claim and a fraud claim in *Khan v. Shiley.* The plaintiffs artificial heart valve (manufactured by the defendant) had a "propensity to fracture" but had not yet fractured or otherwise malfunctioned. *Id.* at p. 851. The plaintiff claimed emotional distress from knowing that her valve might malfunction. Although the court held that the plaintiff had no product-liability claim because the product had not yet caused her damage, the court recognized her viable fraud claim for injuries caused by the defendant's conduct. *Id.* at p. 857. Hence, even though the product was not defective, the defendant could be liable for defrauding the plaintiff into using the product to her detriment.

Cal.App.3d 137. The statute establishes a duty of reasonable care that is not satisfied by unquestioning reliance on representations made by others. The duty of care is breached by a failure to verify and investigate representations when facts are present that would put a reasonable person on notice that the representations are possible false. *Id.*

Business and Professions Code Section 17535 provides that an action for an injunction may be brought by any person acting for the interests of itself, its members, or the general public. A "person" for the purposes of the statute includes any individual, partnership, firm, association, or corporation. Bus. & Prof. §17506. Any person, corporation, firm, partnership, joint stock company, or any other association or organization that violates or proposes to violate the false advertising statutes may be enjoined by any court of competent jurisdiction. Bus. & Prof. Code §17535. **All that is needed to state a cause of action for injunctive relief is an allegation that members of the public are likely to be deceived.** Allegations of actual deception, reasonable reliance, and damages are not necessary. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197.

As further remedy for violation of the false advertising statutes, a court may make such orders or judgments as may be necessary to (1)prevent the use or employment of any practices that violate Business and Professions Code Section 17500 et. seq. or (2) restore to any person in interest any money or property acquired by unlawful practices. Bus. & Prof. Code §17535. The court is authorized to award restitution without individualized proof of deception, reliance, and injury if it determines that such a remedy is necessary to prevent the use or employment of the unfair advertising practices. *Committee on Children's Television, Inc. v. General Foods Corp,.* (1983) 35 Cal.3d 197.

In *Committee on Children's Television , Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197 a group of plaintiffs filed a complaint charging a cereal manufacturer, a retailer, and two advertising agencies with fraudulent, misleading and deceptive advertising in the marketing of sugared breakfast

cereals. The complaint contained causes of action based on two consumer protection statutes (Bus. & Prof. Code §17200 et seq., unfair competition; and Bus. & Prof. Code §17500 et seq., unfair advertising). Defendant's demurrer was sustained without leave to amend by the trial court.

The California Supreme Court reversed and remanded for further proceedings, holding that the complaints stated a cause of action for injunctive relief and restitution under the unfair competition law and the false advertising law. The California Supreme Court stated:

"Plaintiff's second cause of action is based on Business and Professions Code Section 17500 and subsequent sections (the false advertising law), which prohibits the dissemination in any advertising media of any 'statement' concerning real or personal property offered for sale, 'which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.' Bus. & Prof. Code, §17500. Section 17535 authorizes injunctive relief and restitution...Any violation of the false advertising law, moreover, necessarily violates the unfair competition law.

"To state a cause of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public are likely to be deceived.' (citations omitted.) Allegations of actual deception, reasonable reliance, and damages are unnecessary. The court may also order restitution without individualized proof of deception, reliance, and injury if it 'determines that such a remedy is necessary 'to prevent the use or employment' of the unfair practice....."

".....Defendants engaged in a nationwide, long-term advertising campaign **designed to persuade children** to influence their parents to buy sugared cereals. Adapted to its audience, the campaign sought to persuade less by direct representation than by imagery and example. While maintaining a constant theme, the particular advertisements changed frequently. Plaintiffs now contend that these

advertisements were deceptive and misleading, and while we do not know the actual truth of those charges, we must assume them true for the purpose of this appeal.....

".....The California Legislature....has enacted consumer protection statutes and codified common law remedies which in principle apply to all deceptive advertising, regardless of complexity and scale.....

"We therefore conclude that plaintiffs' complaint states a cause of actin for injunctive relief and restitution under the unfair competition law (Bus. & Prof. Code §17200 et seq.) and the false advertising law (Bus. & Prof. Code §17500 et seq.)....." *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210-23.

As in *Committee on Children's Television, supra,* Plaintiff's complaint properly states a cause of action based on Business and Professions Code Section 17500 and subsequent sections (the false advertising law), which prohibits the dissemination in any advertising media of any "statement" concerning real or personal property offered for sale, "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Bus. & Prof. Code, §17500. Plaintiff's complaint requests Equity relief and restitution as authorized by Section 17535.

Plaintiffs complaint alleges that defendants participated in a long-term advertising campaign **designed to persuade children** to purchase cigarettes and that these advertisements were deceptive and misleading. This false and unlawful advertising concealed the true facts concerning the health hazards of smoking, the addictive nature of nicotine, and the cigarette manufacturers' manipulation of the levels of nicotine in cigarettes so as to create and sustain addiction in smokers, including minors.

5. Business and Professions Code Section 17208 Governs the Timeline for Statute of Limitations of Plaintiff's Claims

The Unfair Competition Law applied to all deceptive advertising, regardless of complexity and scale. Therefore, plaintiff's complaint states causes of action under the Unfair Competition Law (Bus. & Prof. Code §17200 et seq.) and the false advertising law (Bus. & Prof. Code 17500 et seq.)

An action to enforce any cause of action under the Business & Professions Code, Section 17200 et seq. must be **commenced within four years after the cause of action accrued.** Bus. & Prof. Code §17208.

In *Suh v. Yang* (N.D. Cal. 1997) 987 F. Supp. 783 the Court held that competitor's wrongful dilution of a martial arts school operator's service name represented multiple, continuous acts that delayed **the accrual of the four-year limitations period applicable to the operator's unfair competition claim under Business and Professions Code Section 17208.** The court also noted that the "doctrine of equitable tolling" suspends the running of the statute of limitations if the plaintiff proves that the defendant fraudulently concealed the existence of the cause of action so that the plaintiff acting as a reasonable person, did not know of its existence.

".....Plaintiff's claim for unfair competition **would not be barred by the four year statute of limitations** since the alleged wrongs.....are multiple, continuous acts, and some of these acts have occurred within the limitations period.... *Suh v. Yang* (N.D. Cal. 1997) 987 F. Supp. 783, 95-796.

Here, as in *Suh v. Yang, supra,* clearly Plaintiff's causes of action are under the unfair competition law (Bus. & Prof. Code §17200 et seq.) and **the Statute of Limitations on his causes of action are four years triggered on or about October 15th, 2000** when it was revealed by Jeffrey Wigand on MSNBC. (Pet. App. J, FAC at ¶27.)

E. Plaintiff's Claims are Brought as a Result to Defendants' Breach of Assumed Duty (Pet. App. I and J, FAC at ¶¶87, 89)

In this case, plaintiff's First Amended Complaint

alleges that defendants' voluntarily assumed special duties by issuing the "Frank Statement to Cigarette Smokers":
"We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."

"We always have and always will cooperate closely with those whose task it is to safeguard the public health."

"We are pledging aid and assistance to the research effort into all phases of tobacco use and health." Pet. App. I and J at 123, First Amended Complaint ¶123.

Later, defendants published "A Statement About Tobacco and Health":

"We recognize that we have a special responsibility to the public - to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use. We accepted this responsibility in 1954 by establishing the TIRC.....We shall continue all possible efforts to bring the facts to light." First Amended Complaint ¶131.

Defendants have re-affirmed these undertakings in various ways over the years. First Amended Complaint ¶¶132, 133, 134, 135, 136, 137.

In making these commitments, defendants assumed duties to plaintiff and to the public in general.

Defendants specifically pledged and undertook "a special responsibility to the public" and "accept[ed] an interest in people's health as..... paramount to every other consideration in [their] business." Id.

In accepting these responsibilities, defendants undertook three specific duties. First, by committing themselves to making the people's health their preeminent responsibility, the tobacco companies agreed that they would not sell or continue to sell products which they knew to cause death and disease when used as intended. The violation of this specially assumed duty is the direct cause

of Plaintiff's injuries (See FAC ¶¶87, 89). Second, defendants pledged to cooperate with those responsible for safeguarding the public's health. In fact, they did the opposite. Third, regardless of whether the tobacco companies had any duty to speak publicly on the subject, **having repeatedly undertaken to do so, they were legally bound to speak the full and complete truth.** *Bank of America v. Greenbach,* (1950), 98 Cal. App.3d at 232. Not only did defendants willfully fail to perform this duty, they actively conspired to conceal, suppress and distort the scientifically established facts that they knew.

Defendants reasonably should have foreseen the risk of harm that physical injury to cigarette smokers was not only foreseeable, it was contemplated as the inevitable consequence of a breach of defendants' undertakings. With regard to physical addiction, such injury was intended as defendants manipulated and tampered the nicotine in cigarettes to sustain addiction. **The injuries suffered by plaintiff are closely connected with defendants' conduct.** Defendants' conduct is morally reprehensible. **The tobacco defendants undertook a duty to protect the public's health by supporting independent research into the safety of tobacco disclosing the results of the research, and refraining from marketing products they knew would cause disease and death.** Meanwhile, defendants suppressed the results of research demonstrating that smoking caused death and disease and continued to sell products they knew caused death and disease, while at the same time altering their products to make them more addictive and halting the development of safer cigarettes.

This action is for injuries caused by dishonesty and the failure to fulfill commitments. The injury alleged is not an invasion of the right to safe products, but an invasion of the rights to be dealt with honestly and to have commitments performed. See *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992) (liability for fraud is based on a "general obligation - the duty not to deceive"). In short, the cause of the harm here was the defendants' conduct, not their products. [This point also holds true for the plaintiff's claims that the defendants breached their

specially assumed duty to make safety the companies' primary concern. Had defendants not undertaken such an obligation (and not committed the other misconduct alleged), section 1714.45 would protect them from liability for marketing products that were inherently unsafe. **Having publicly committed themselves to safety, however, and having acted to enhance the danger of their products, defendants invaded the public's and the plaintiffs interests in truthfulness. That legal injury was caused by conduct, not by products.]**

The distinction between claims based on dishonest conduct and claims based on defective products is well established in California law. In *Khan v. Shiley*, 217 Cal. App.3d 848, 855-58, 266 Cal. Rptr. 106 (1990), the court stated:

"Products liability is the name currently given to the area of law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products. (Prosser & Keeton, Torts (5th ed. 1984 &sect95, p. 677.) Possible theories of recovery include strict liability in tort , negligence (i.e., in creating or failing to discover a flaw, in failing to warn or failing adequately to warn, or in the sale of a defectively designed product) and breach of warranty (express and implied). Allegations of fraud, however, are in a class by themselves..... Unlike the other theories, in which the safety and efficacy of the product is assailed , the fraud claim impugns **defendants' conduct.**"

Based on this distinction, the court dismissed the plaintiff's claims for emotional distress based on product liability, but upheld claims based on fraud. *See also Westlye v. Look Sports*, 17Cal.App. 4th 1715, 1741-1750, 22 Cal. Rptr. 781 (1993) (classifying claims for products liability separately from claims based on misrepresentation); 6 Witkin, *supra*, Torts, & sect&sect674 *et seq.*, &sect&sect948 *et seq.*, &sect&sect1241 *et seq.* (addressing liability for fraud in Chapter VI, separate from discussion in Chapters VII and

IX of liability for defective products).

Similar reasoning underlies the Supreme Court's decision in *Cipollone v. Liggett Group, Inc. supra*, 505 U.S. 504. The plurality held that federal laws mandating warnings on cigarette packages did not preempt state laws permitting recovery for fraud and false advertising. The Court reasoned that the federal statutes only preempted local laws allowing actions "based on smoking and health," and that liability for fraud is predicated "on a more general obligation - the duty not to deceive." *Id.* at 528-29. Similarly, the court found no preemption of claims for a breach of express warranty, based as they were on a voluntary undertaking of the manufacturer. *Id.* at 525-26; *accord, Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 1068, 31 Cal. Rptr. 2d 358 (1994) (federal law does not preempt California statute that protects minors from cigarette advertising.)

These results are consistent with section 1714.45(a)(2), which expressly refers to Comment i of Section 402A of the Restatement (Second) of Torts. **Comment i explains that a manufacturer escapes liability where the product is inherently unsafe, but is liable if the manufacturer's conduct adds to the danger of a product.**

Comment i states, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous." Here, defendants are alleged to have added to the danger of cigarettes by deliberately enhancing the addictive quality of nicotine. FAC ¶¶189-233. Thus, section 1714.45 does not protect defendants from liability caused by their altered product.

In fact, these exceptions confirm that the Legislature intended to protect inherently unsafe products, but did not intend to immunize misconduct by manufacturers. A breach of an express warranty is an affirmative misrepresentation about the product. A manufacturing defect is a mistake in the manufacturing process that adds to the product's danger. Yet both types of claims fall within the rubric of "product liability actions." *See, e.g. Barker v. Lull Engineering*, 20 Cal. 3d 413, 429, 143 Cal. Rptr. 225 (1978)

(manufacturing defect); *Westlye v. Look Sports, supra*, 17 Cal. App. 4th at 1748 (express warranty). Therefore, to exclude such misconduct from the reach of section 1714.45 required an express exception.

By contrast, while also involving misconduct, allegations of fraud (or breach of an assumed duty) do not fall within the rubric of product liability; they "are in a class by themselves." *Khan*, 217 Cal. App.3d at 857. Therefore, there was no need to name fraud as an exception to section 1714.45's prohibition. In *City and County of San Francisco v. Philip Morris Inc.* (N.D. Cal. 1997) 957 F. Supp. 1130, 1140, the Court, in deciding an action brought by various counties against cigarette manufacturers, held that "**California law recognizes a distinction between claims based on fraudulent conduct and claims based on defects in a product.**" (Emphasis added.) The Court approvingly cited Khan v. Shiley, which recognized the distinction between fraud actions and actions based on smoking and health. Based on this distinction, the Court found that plaintiffs' **state law fraud and special duty claims were not barred by the former version of Civil Code Section 1714.45.** *City and County of San Francisco, supra*, 957 F. Supp. at 1140. No California appellate court has ruled otherwise.

F. *Cipollone* is the Law in Cigarette Cases (*Cipollone v. Liggett Group, Inc.* 505 U.S. 504),

Plaintiff's causes of action are all adequate and proper under *Cipollone* (*Cipollone v. Liggett Group, Inc.* 505 U.S. 504.) and none of the causes of action are barred or preempted as alleged in plaintiff's first amended complaint. Despite the confusion in the Federal and State Courts, one thing is very clear: Cipollone is the law on preemption in cigarette cases. Amplified and supported by the U.S. Supreme Court in *Medtronic, Inc. v. Lohr* (1996) 116 S. Ct. 2240. *Cipollone* holds:

"In our opinion, the preemptive scope of the 1965 act and the 1969 act is **governed entirely by the express language**

in §5 of each act...."

The Supreme Court discussed the test of express preemption, which is:

"[Whether the legal duty that is the predicate of the common law damages action constitutes a requirement or prohibition based on smoking and health....imposed under State law with respect to.....advertising or promotion, giving that clause a fair but narrow reading."

The Court specifically held that section 5(b) **does not generally preempt state-law obligations to avoid marketing cigarettes with manufacturing defects [strict liability] or to use a demonstrably safer alternative design for cigarettes.**

The Supreme Court also held that **express warranty claims are not barred or preempted:**

"As demonstrated above, however, **the 1969 act does not sweep so broadly: the appropriate inquiry is not whether a claim challenges the propriety" of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion.**

"A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the "requirements" imposed by an express warranty claim are not imposed under state law," but rather **imposed by the warrantor.** n23 If, for example, a manufacturer expressly promised to pay a smoker's medical bills if she contracted emphysema, the duty to honor that promise could not fairly be said to be imposed under state law, " but rather is best understood as undertaken by the manufacturer itself. While the general duty not to breach warranties arises under state law, the particular "requirement...based on smoking and

health....with respect to the advertising or promotion [of] cigarettes" in an express warranty claim arises from the manufacturer's statements in its advertisements. **In short, a common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a requirement...imposed under State law" within the meaning of §5(b)."**

The Supreme Court also held that **claims for fraudulent misrepresentation of material fact, and for fraudulent nondisclosure or concealment, or any other state law proscriptions on intentional fraud are not barred or preempted.**

"Petitioner's second theory, as construed by the district court, alleges **intentional fraud and misrepresentation both by false representation of a material fact [and by] conceal[ment of] a material fact.** The predicate of this claim is a state law duty not to make false statements of material fact or to conceal such facts. Our preemption analysis requires us to determine whether such a duty is the sort of requirement or prohibition proscribed by §5(b).

Section 5(b) preempts only the imposition of state law obligations with respect to the advertising or promotion" of cigarettes. Petitioner's claims that respondents concealed material facts are therefore not preempted insofar as those claims rely on a state law duty to disclose such facts through channels of communication other than advertising or promotion. Thus, for example, if state law obliged respondents to disclose material facts about smoking and health to an administrative agency, §5(b) would not pre-empt a state law claim based on a failure to fulfill that obligation.

The Supreme Court made it very clear that fraudulent misrepresentation claims, <u>even those based on advertising</u>, are not barred or preempted:

"Moreover, **petitioner's fraudulent misrepresentation**

claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not preempted by §5(b). Such claims are not predicated on a duty based on smoking and health" but rather on a more general obligations -- the **duty not to deceive.** This understanding of fraud by intentional misstatement is appropriate for several reasons. First, in the 1969 act, congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud. To the contrary, the 1965 and the 1969 acts explicitly reserved the FTC's authority that the FTC had long exercised and continues to exercise. See §5(c) of the 1965 act; §7(b) of the 1969 act; see also nn. 7, 9, supra. **This indicates that congress intended the phrase relating to smoking and health" (which was essentially unchanged by the 1969 act) to be construed narrowly, so as not to proscribe the regulation of deceptive advertising."**

Therefore, plaintiff's fraudulent concealment claims and claims that the Cigarette Defendants misrepresented information and also suppressed information from the public, including plaintiff, are not barred or preempted. Finally, the Supreme Court also **approved of the conspiracy claim.**

"Petitioner's final claim alleges a **conspiracy** among respondents to misrepresent or conceal material facts concerning the health hazards of smoking. n28 The predicate duty underlying this claim is a duty not to conspire to commit fraud. For the reasons stated in our analysis of petitioner's intentional fraud claim, this duty **is not preempted by §5(b)** for it is not a prohibition base on smoking and health" as that phrase is properly construed. Accordingly, we conclude that the **1969 Act does not preempt petitioner's conspiracy claim."**

Clearly, under *Cipollone* the allegations contained in Plaintiff's conspiracy count are not preempted. See also, *Casano v. The American Tobacco Co., et al,* 870 F. Supp. 1425

(E.D. La. 1994) and *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515 (D. Kan. 1995).

"The concealment allegations, insofar as they rely on **a state law duty to disclose material facts through channels of communication other than advertising and promotions,** do not involve an obligation with respect to those activities within Section 5(b)'s [the preemption section's] meaning."

"The "state law duty to disclose material facts through channels of communication other than advertising and promotions" arises through voluntary assumption of duty."

The law is well settled that one who undertakes to do something has a duty to do it non-negligently. See, e.g., *Williams v. State of California* (1983) 34 Cal.3d 18, 23. Cigarette Defendants, including Brown & Williamson, both prior to and after 1970 engaged in a consistent, intensive pattern of nonpromotional advocacy. The post-1970 advocacy statements of Cigarette Defendants and their industry fronts *create* a duty **because they constitute an "undertaking"**. One who undertakes to communicate with the public has a duty to do it non negligently. This principle applies even if the party has no duty to communicate in the first place.

Cipollone does not extend preemption to duties that arise *through the actions of the defendant*, rather than through state law alone. *Cipollone* stated that duties that are "undertaken" by the defendants are not considered preempted:

"[A] common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a requirement....imposed under State law" within the meaning of §5(b). 120 L. Ed. 2d 407, 428.

Cigarette Defendants' advocacy activities can also be seen as violations of the **"duty not to deceive" which is also not barred or preempted** under *Cipollone:*

"Moreover, petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not preempted by §5(b). Such claims are not predicated on a duty based on smoking and health" but rather on a more general obligation -- **the duty not to deceive**, 120 L. Ed. 2d 407, 430.

G. Statute of Limitations is Primarily a Question of Fact Appropriate For Jury Consideration Pursuant to the Seventh Amendment of the United States Constitution

The California Supreme Court stated that "resolution of the Statute of Limitations issue is normally a question of fact,...." *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d at p. 1112. The timeline and the question of Statute of Limitations is essentially fact-bound in nature, and thus it should be submitted to the jury for consideration.

That amendment applies not only to common-law causes of action but also to statutory causes of action analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard of courts of equity or admiralty. *E.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 P. 17. The question whether the statute of limitations barrs plaintiff's complaint presents primarily a question of fact appropriate for jury consideration.

III. CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Maher W. Soliman, JD
Petitioner in Propria Persona

Date: April 28th, 2003

NO. _____

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IN THE

Supreme Court of the United States

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MAHER W. SOLIMAN

Petitioner,

v.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE.

Respondents.

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PROOF OF SERVICE

I, MONICA VOGEL, do swear or declare that on this date, April 28th, 2003, as required by Supreme Court rules of Court, I have served three copies of the enclosed PETITION FOR WRIT OF CERTIORARI and APPENDIX on each party to the above proceeding or that party's counsel, and on every other person required to be served, by

depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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Attorneys for Tobacco Institute, Inc

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 28th, 2003

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MONICA VOGEL